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The Honorable Elliott Abrams
Assistant Secretary of State
for Human Rights and Humanitarian
Affairs
U.S. Department of State
2201 C Street NW
Washington, D.C. 20510

Dear Mr. Abrams:

Enclosed please find Amnesty International's latest information on the human rights situation in Argentina.

We trust that this information will be useful to you.

Sincerely,

Rona Ellen Weitz

Rona Ellen Weitz
Area Coordinator for Latin America

DS — It seems to me this is a serious & useful little group, please draft a thank you note from me.

Thanks

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THE STATE OF SIEGE AND POLITICAL IMPRISONMENT IN ARGENTINA.

BACKGROUND.

There are now approximately 1000 political prisoners in Argentina, about 500 of whom are held a la disposición del Poder Ejecutivo Nacional (at the disposal of the National Executive Power - PEN) under the terms of the state of siege introduced on 6 November 1974. The majority of these 500 prisoners have never been brought to trial; the remainder were either acquitted by the courts or have already completed their sentences.

a) The State of Siege

The state of siege is an emergency measure provided for under Article 23 of the Argentine Constitution during situations of 'external attack' or 'internal unrest'. The effect of the state of siege is the suspension of individual guarantees laid down in the first part of the Constitution, with the limitations given in section (b) below.

The state of siege has been in force since 6 November 1974. It was established by President Isabel Peron during a congressional recess and Congress has never ratified or rejected it. After the military coup of 24 March 1976, legislative functions were shared between the President and the Junta de Comandantes (Junta of the Commanders-in-Chief of the Armed Forces). The state of siege was ratified on their first day in office and the derecho de opción (right of option to exile) was suspended.

b) Detention Under Article 23 of the Constitution.

Article 23 of the Argentine Constitution gives the Executive power to detain citizens without charge or trial at its discretion. Since this is a non-penal procedure, Article 23 also establishes the limitations of the Executive's power: it may not impose sanctions, nor may it assume judicial functions; regarding prisoners, its authority is limited to arresting them or transferring them within the country.

"unless they choose to leave the country". This last clause is commonly known as the derecho de opción (right of option).

Article 23 of the Constitution has been in effect since the mid-1800s and a state of siege has been imposed in Argentina on many occasions. Until 1976, the derecho de opción had not been suspended nor derogated, although in 1975 under President Isabel Peron, it underwent several regulatory changes which lengthened the application procedure and limited the possible countries of exile. However, these changes were never tested in the courts because, in spite of them, prisoners continued to leave the country.

After the military coup of 1976, the military junta suspended the derecho de opción sine die by Institutional Act. Several court cases tested this suspension and the Federal Court of Appeals for Buenos Aires (whose members were appointed by the military), declared the suspension unconstitutional in ERCOLI, María Cristina. Before this case reached the Supreme Court, the Junta amended the Institutional Act, making the suspension for a six month period. Temporary legislation was enacted which provided for a sort of "option" not based on the constitutional provision (Laws 21.448 and 21.449). These laws call for applications to be reviewed during a six month period and for them to be decided by the Executive. Thus a constitutional right has in effect become a discretionary one, determined by the President (as head of the Executive).

The Supreme Court then declared the ERCOLI case moot. (1) Eighteen months after the coup the Junta announced the restoration of the derecho de opción under a new Institutional Act. However, at the same time it enacted Law 21.650 which established a procedure identical to the one imposed by Laws 21.448 and 21.449, including a six month processing period, a six month waiting period after denial and the presidential veto on the "option" if the Executive considers the applicant a danger to the peace and security of the Nation. Over the past five years, less than 5% of the applications have been granted.

(1) ie the case had already been disposed of.

The Supreme Court, relying on a time-honoured judicial doctrine dating from the first military coup of 1930, recognises the validity of amendments to the Constitution by de facto governments. This means that Institutional Acts enjoy supremacy over the Constitution, whenever there is any conflict between them. The basis for this doctrine is that such amendments are promulgated by a government that is "efficacious" (i.e. its orders are obeyed by the majority of the population).

However, the Supreme Court has ruled that Executive decisions are subject to the judicial control of "reasonableness". The "reasonableness" of such detentions has been challenged in the courts. In ZAMORANO (1979) the Supreme Court upheld the arrest of lawyer Dr. Zamorano on the basis of a report in camera by the Minister of the Interior. On the whole, since 1976, the Supreme Court has managed to avoid the issue without ever clearly stating that the actions of the Executive were or were not subject to review by the judiciary.

It should be noted, however, that lower courts have shown even more reluctance to order the Executive to release prisoners. Some take the view that such decisions fall within the sphere of the administration rather than the judiciary; others accept the doctrine of "reasonableness" but are satisfied with the explanations given by the Executive to justify the detentions.

c) The MOYA case.

Benito Alberto Moya was arrested in 1975 when he was nineteen years old. He was acquitted by the courts in 1979. He was refused the derecho de opción on six occasions.

The Court of Appeal in Bahía Blanca sustained the defence's contention and ordered the Executive to allow Sr. Moya to leave the country within ten days of its ruling. The defence had raised an issue of administrative law: (i) that actions committed to the discretion of the Executive are "reviewable" by the courts and (ii) that the standard of the review should not merely be the "arbitrary" nature of the detention but also it should be based on "rationality". The prosecution appealed against the ruling of the Bahía Blanca Court and the case went before the Supreme Court.

In May 1981 the Supreme Court upheld but modified the earlier ruling, allowing the Executive to chose between compliance (in this case the granting of the derecho de opción) and the release of the prisoner into libertad vigilada (restricted liberty). The Executive argued that Moya's activity abroad might exacerbate the conditions that gave rise to the state of siege. The Court found his prolonged detention "unreasonable" but decided that, in the absence of his being granted the right of option, placing him in libertad vigilada (restricted liberty) would strike the right balance between his right to personal freedom and the government's right and duty to ensure peace and security. Sr. Moya was released into restricted liberty in mid-1981.

Since Moya, some courts have used the same or a similar ruling to order the release or "option" of political prisoners. Higher courts have always upheld the continued detention of the plaintiff and have argued that the actions of the Executive were not subject to review by the judiciary. None of the cases presented to the lower courts has reached the Supreme Court.

Thus it can be seen that judicial rulings have largely confirmed the political decisions of the Executive. Only a few isolated rulings have challenged the Executive's power to detain citizens. The membership of the Supreme Court has remained the same since the military coup and its rulings have been relatively consistent. These rulings have not trodden new ground. This was done by isolated decisions of the lower Courts of Appeal whose members were then often replaced.

d) The First Collective Habeas Corpus Petition.

On 23 September a petition of habeas corpus was filed on behalf of 329 PEN prisoners by lawyers from the Centro de Estudios Legales y Sociales (CELS) - a human rights group in Buenos Aires. The action had the support of the other human rights groups in Argentina and of the families of the prisoners concerned. The case went before Federal Court No 3 in Buenos Aires. The case was divided into 32 actions, each one on behalf of about ten individual prisoners.

Between November 1980 and April 1981 all the cases were rejected by the court. In addition, on the first ruling, the lawyers were sanctioned by the Judge who ruled that the complexities of the proceedings caused by the large number of individual cases being presented amounted to a "wastage of the court's time" (estrepitus fori). This was later overruled by the Appeals Court. However, the court's rejection of the habeas corpus petition was upheld on appeal.

The CELS lawyers then presented a petition of unconstitutionality and the cases have now gone before the Supreme Court. While awaiting action in the Supreme Court, the Executive has ordered the unconditional release of 40 of the plaintiffs and the release into libertad vigilada (restricted liberty) of 39 others. One detainee has been granted the derecho de opción and another was expelled from the country.

The Supreme Court has not yet made its ruling. Lawyers have expressed concern at the slowness of the legal proceedings. A prompt ruling in habeas corpus petitions is essential as any delay lengthens the period a prisoner is deprived of his freedom. The habeas corpus petition has now been under consideration for over one year.

e) The Second Habeas Corpus Petition.

A second collective habeas corpus petition was filed on 1 October 1981 on behalf of 155 PEN detainees. The Federal Court No 4 in Buenos Aires decided to examine each case individually. Already the court has declared itself incompetent to proceed because some of the plaintiffs are not detained in Buenos Aires. This ruling alters existing jurisprudence and seriously prejudices prisoners detained outisde the capital. Legal assistance is harder to obtain in Rawson and La Plata, where the majority of prisoners are held.

The petition is based on seven points:

1. The supremacy of the Constitution over decrees and amendments introduced by de facto governments (ie Institutional Acts etc).

3. The judiciary, according to the Constitution, can determine the legitimacy and "reasonableness" of the actions of the Executive so that individual and collective rights laid down in the Constitution are protected.
4. That the prolonged detention of the plaintiffs (from 4-7 years) amounts to a real punishment imposed by the Executive, in violation of Articles 18, 23 paragraphs 19 and 95 of the Constitution.
5. That the punishment is aggravated by the severity of the conditions of detention.
6. That the plaintiffs have made frequent requests for the derecho de opcion under Article 23 of the Constitution. The Executive based its refusal of the applications on Law 21.560 (September 1977) which effectively has turned a constitutional right into a concession.
7. The plaintiffs are therefore in a state of "defencelessness".

Following the rejection of the habeas corpus petition, an extraordinary petition was presented which pointed to the "ideological bias" of the ruling. The petition argues that the doctrine of 'national security' gives the authorities a de facto right to impose restrictions on personal rights and individual liberties. The petition also contends that:

1. constitutional provisions regarding the state of siege are not being followed.
2. the continued detention and inhuman treatment of those arrested amounts to a real penalty.
3. the repeated denial of the right of option has transformed a constitutional right into a discretionary award.

As of April 1982, the Supreme Court has to make a ruling on 32 prisoners in the same stiutation as Benito Moya. Rulings also have to be made on the 155 persons included in the second collective habeas corpus petition.

f) Libertad vigilada (restricted liberty)

Increasingly over the last two years PEN prisoners have been released within Argentina rather than into exile. Most prisoners have been granted libertad vigilada (restricted liberty). This is

sometimes misleadingly translated into English as "parole". "Parole" implies the restoration of freedom subject to conformity to certain administrative requirements to ensure reasonable supervision by the authorities, before the completion of a sentence. The Argentine judicial system has such a provision - libertad condicional.

PEN detainees are not entitled to libertad condicional because by definition they are not serving any sentence nor are they subject to judicial control. Lists of released prisoners provided by some Argentine Embassies (notably in the United States) use the word "parole" to cover release into libertad vigilada and arresto domiciliario (house arrest).

Contrary to the specific mandate of Article 23 of the Constitution, the military enacted a law that allows the Executive to hold PEN prisoners in detention centres or in arresto domiciliario or in libertad vigilada (September 1977). Prisoners in house arrest are not allowed to leave a specific place of residence (normally his/her own home) for any reason. S/he is permanently under police guard and these officials often live in the place of residence. S/he is not allowed visits, except by members of the direct family unit and then only one at a time and no more than once or twice a week. Prisoners under house arrest may not work.

Prisoners under restricted liberty are confined to a specific city and must report to the police or military authorities every week. They must obtain permission to work or to travel. They must refrain from meeting more than a few people at a time. Such conditions clearly are significantly more restrictive than those applicable to "parole".

Furthermore, reports indicate that local military authorities exercise a great deal of discretion regarding the situation of PEN detainees in the two categories. In some cases libertad vigilada bears a much closer resemblance to house arrest.

Amnesty International has received the following account from a prisoner released into libertad vigilada:

"... I can best describe my own situation, and that of so many others, by saying that I am a prisoner with some liberty. This is really what restricted liberty is. I think you probably know something about it but I will tell you all the same.

A prisoner is removed from prison and he has to choose a place to live. A specific area is laid down and the prisoner cannot leave this zone. The size and extent of this area varies according to the municipal district in the town or village. Sometimes it is very small.

In some cases, my own included, the prisoner does not decide where he wishes to go to. I had to stay in Buenos Aires which is over 700 kilometres from my family, children, parents, friends and neighbours. Adaptation to life outside the prison is even harder among strangers.

In spite of these problems I have been lucky to find myself among people who have not abandoned me. They have helped me in the past and they continue to do so now.

Even more of a problem than the restrictions on my movement is that of having to present myself every three days to the local police. Sometimes I have to report even more often, if they think it is necessary; I have to allow the police to enter my house on inspection visits whenever they wish. This happens often. I also have to tell the concierge or leave a note explaining where I have gone, in case anyone comes to check on me. I also have to say who comes to visit me. I am not allowed to engage in any type of trade union or political activity. I cannot participate in meetings or make public statements. This then is my 'freedom', and a decree hangs over me which states that failure to abide by any of the established regulations is punishable with 3 months to 8 years' imprisonment..."

g) Exiles and the "Right of Option"

Since the military coup of 24 March 1976 approximately two hundred PEN prisoners have been granted the "right of option" and have left Argentina for exile. Under the terms of Article 281 para. 3

of the Argentine Penal Code, prisoners who left Argentina under the "right of option" may face prison terms of 1-4 years if they attempt to return to the country. Article 281 paragraph 3 which was introduced by the military government after the coup states:

> "El que fuere detenido a disposición del Poder Ejecutivo y ejerciere el derecho de opción de salir del territorio nacional en los términos del articulo 23 de la Constitución Nacional y regresare ilegítimamente por cualquier medio, al país, será reprimido con uno a cuatro años de prisión. No será punible el reingreso al territorio nacional si mediare alguna de las circunstancias siguientes:
>
> 1°) Si hubiera cesado el estado de sitio, durante el cual ejerció la opción;
>
> 2°) Si se dejare sin efecto el arresto;
>
> 3°) Si se constituyere detenido ante autoridad inmigratoria o policial en el momento del reingreso al territorio argentino"

Translation by AI

"Anyone detained at the disposal of the Executive Power who exercises his right of option to leave the country under the terms of Article 23 of the Constitution, if he returns illegally to the country, by whatever means, shall be punished with one to four years' imprisonment. Return to the country will not be punished under the following circumstances:

1) If the state of siege under which the option was granted has been lifted

2) If the decree ordering the arrest is no longer valid

3) If the person was arrested by immigration authorities or by the police upon his return to Argentina."

In September 1981, the then Argentine Minister of Foreign Affairs in an interview with Le Monde said that all Argentinians living abroad, except those active in 'terrorist organizations', could return to their country. He added that the Argentine Embassy in France had been given instructions to open its doors to those who

wished to re-establish contact.

However, the outcome of a recent legal action to test the willingness of the Executive to permit the return of exiles to Argentina is not encouraging.

Habeas Corpus Petition on Behalf of Senator Hipólito Solari Yrigoyen.

Hipólito Solari Yrigoyen defended political prisoners during the period 1969-72. In 1973 he was elected to the Argentine Senate representing the centrist Unión Cívica Radical. Throughout his political career Senator Solari Yrigoyen has been known for his defence of human rights which led to various attempts on his life.

On the night of the 7/8 August 1976 he was abducted from his home in Trelew. He was held for two weeks in unofficial detention in Bahía Blanca and Viedma. On 30 August 1976 he was taken from his place of detention in an unmarked car. He was thrown out of the car and immediately picked up by a police patrol. He was then taken to the offices of the Federal Police in Viedma. His arrest was officially acknowledged on 1 September 1976 and he was placed at the disposal of the National Executive. On 11 September 1976 he was transferred in a navy aeroplane to the Naval Air Base "Almirante Zar" in Trelew and from there to Rawson Prison. He was subjected to torture both at the base and in prison. In May 1977 he was allowed to leave Argentina under the "right of option". He now lives in France.

In December 1981 a habeas corpus petition was presented on behalf of Senator Solari Yrigoyen to ascertain whether he would be liable to arrest on his return to the country. The petition sought clarification from the Executive as to whether the order for his arrest under PEN was still valid- it further called into question the constitutionality of Article 281 paragraph 3 of the Penal Code since it amounted to the indirect imposition of a sentence (of exile) without any offence being committed. It added that the "right of option" was not intended to be a punishment.

Furthermore, the petition questioned whether the return of an Argentine national to his native land could ever be considered "illegal" and reference was made to Article 14 of the Constitution which guarantees civil rights:

Article 14 states:

"Todos los habitantes de la Nación gozan de los siguientes *derechos conforme a las leyes que reglamenten su ejercicio; a* saber: de trabajar y ejercer toda industria lícita; de navegar y comerciar; de peticionar a las autoridades; de entrar, permanecer, transitar y salir del territorio argentino; de pulicar sus ideas por las prensa sin censura previa; de usar y disponer de su propriedad; de asociarse con fines utiles; de profesar libremente su culto; de enseñar y aprender"

Translation by AI:

"All inhabitants enjoy the following rights, in accordance with the laws which govern them; that is: to work and engage in all permitted industry; to navigate and engage in commerce; to petition the authorities; to enter, to remain in, to travel within and leave the national territory; to publish ones views in the press without censorship; to make use and dispose of ones property; to associate; to practise freely ones religion; to teach and to learn".

Following the presentation of the habeas corpus petition, the Buenos Aires Herald, in an editorial, asked rhetorically what Senator Solari Yrigoyen's crime was? "Was it a crime to be to the left-of-centre politically?" On 8 January 1982 Clarín reported that the Executive had denied Senator Solari Yrigoyen permission to return to Argentina on the grounds that he was an "ideologist *of terrorism*" (*ideólogo del terrorismo*).

In preparing this document, Amnesty International has drawn upon material in its archives and also wishes to acknowledge the useful documentation of the Centro de Estudios Legales y Sociales (Centre for Legal and Social Studies) in Buenos Aires and the Americas Watch Committee in Washington D.C.